No. 73-719

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# In the Supreme Court of the United States

OCTOBER TERM, 1973

GILBERTO SANTANA, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of possession of narcotics with intent to distribute, in violation of 21 U.S.C. 812, 841 and 844.[1] The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

The facts, as stated in the opinion of the court of appeals, show that on June 8, 1973, detective Campbell and patrolman John DeRosa, both narcotics investigators of the New York City Police Department, were conducting a visual surveillance of the La Concha Restaurant on Manhattan's upper West Side. This restaurant was known by the police to be a meeting place for

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[1] Alfredo Aviles was indicted along with petitioner but was tried separately following a motion for severance by the government.

persons engaged in the narcotics trade. Late in the evening, the officers observed petitioner and a companion arrive at the restaurant and double park in front. The two men returned half an hour later, with Santana carrying a brown paper bag.[2] Petitioner and his companion then drove to an apartment building at 331 West End Avenue, and, after again double parking the car, petitioner entered the building and emerged about ten minutes later with another brown paper bag.

Their suspicions heightened, the officers left their car and approached petitioner's vehicle on foot. Patrolman DeRosa tapped at the window on the driver's side. When petitioner lowered the window, the officer asked him to produce his driver's license and vehicle registration. Petitioner voluntarily opened the door, stepped out of the car, and reached for his wallet leaving the door about two feet open. DeRosa opened the door the remaining distance (about a foot) and stepped between the door and the car.[3] At that time, and from that position, he observed a clear plastic bag filled with a white powder, which had evidently been secreted between the door and the front seat. He seized the bag, and, assuming the contents to be narcotics, placed both petitioner and Aviles under arrest. DeRosa did not physi-

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[2] Petitioner was known to the officers and considered to be among the hundred major narcotics violators in New York City. An anonymous informant had advised them that petitioner was "heavily engaged in narcotics activities." His companion Aviles was not identified at that time.

[3] DeRosa testified that opening the door was a precaution to prevent petitioner's shoving the open door against him: "That's the training we received in the New York City Police Department." (Suppression Hearing Transcript, p. 32). This procedure was routinely followed when stopping suspects for identification or for traffic violations.

cally enter the car prior to seeing the narcotics or making the arrest.

Petitioner contends that the seizure of narcotics from his automobile was illegal in the circumstances and that the prosecuting attorney's remarks in summation prejudiced his right to a fair trial. Both of these contentions are fully answered by the opinion below, on which we rely in urging that the petition for a writ of certiorari be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

JANUARY 1974.